



DEPARTMENT OF LAW
OFFICE OF THE

Attorney General

STATE CAPITOL
Phoenix, Arizona 85007

BRUCE E. SABBITT
ATTORNEY GENERAL

January 9,

LAW LIBRARY
ARIZONA ATTORNEY GENERAL

The Honorable Robert B. Usdane
Arizona State Senator
State Capitol, Senate Wing
Phoenix, Arizona 85007

Re: 78- 1 (R77-194)

Dear Senator Usdane:

This is in response to your letter of June 1, 1977 wherein you requested that we review Attorney General Opinion No. 73-9 (March 28, 1973) in light of several changes in the State's "Open Meetings Law" since the opinion was originally issued.

Att'y Gen'l Op. No. 73-9 considered certain actions of the Board of Regents under Arizona's Open Meetings Law (A.R.S. § 38-431 et seq.). The actions in question included the following:

1. Failure to release Board agendas to the public prior to the Regents' meetings.
2. Forbidding the public to speak at the meetings without first obtaining the unanimous consent of the Board.
3. Approving several items at one time with little or no discussion, after having private sessions from which the public was excluded.
4. Taking action in public session with little or no discussion, after holding private sessions at which these actions were discussed and in some cases the Board members had already come to a decision as to how they would vote.

With respect to these actions, we found, as reported in Opinion No. 73-9:

1. Nothing in existing law required the Board of Regents to release advance copies of their agendas, and that the public had no inherent or statutory right to see a copy of the Board's agenda.

2. There were no provisions in the

public meeting statutes which required the Board of Regents to allow the public to speak at regular meetings of the Board.

3. No statute prohibited voting on more than one item in a single vote.

4. The Board of Regents, as well as other governing bodies, could hold private sessions and discuss legal actions so long as the Board and its staff made no attempt to act without first voting on the proposed action in a public meeting.

For several reasons which are discussed below, modifications in conclusions 1,2 and 4 are in order.

A. Notice Concerning Agendas and Subject Matter of Public Meetings

In 1974, just over a year after Opinion No. 73-9 was issued by this office, the Legislature amended the Open Meetings Act by adding provisions that required governing bodies to give notice to the public of the regular and special meetings to be conducted by those bodies. A.R.S. § 38-431.02A provides, in part:

A. Public notice of all regular meetings of governing bodies shall be given as follows:

1. The state and its agencies, boards and commissions shall file a statement with the secretary of state stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings. (Emphasis added.)

* * *

The Open Meetings Act does not expressly require that notices of public meetings include a description of the subject matter of the meeting. However, in our opinion, the Open Meetings Act implicitly requires subject matter notice. We have heard often that "a meeting can hardly be termed open unless the public knows of its time and place and subject matter to be considered."¹

1. Mitchell, Public Access to Governmental Records and Meetings in Arizona, 16 Ariz.L.Rev. 891, 900 (1974).

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As we pointed out in Att'y Gen'l Op. No. 75-7 (August 19, 1975), being overly cautious in giving public notice under the Open Meetings Act is clearly justified in view of the serious consequences for violations of the Act. At the time we issued Opinion No. 75-7 we sent a memorandum to all state agencies describing appropriate procedures for those agencies to follow in complying with the notice and minute-taking requirements of the Open Meetings Act. (A copy of that memorandum is attached hereto for your information.) The recommended form for notices set forth in that memorandum included a statement that members of the public could obtain information concerning the governing body's agenda for the meeting described in the notice by calling a specified telephone number. We believe that state agencies would be well advised either to follow that procedure or to set forth the contents of the agenda verbatim in the notice of the meeting.

We disagree with our prior conclusion in Opinion No. 73-9 that the public has no statutory right to see a copy of the Board's agenda. The Public Records Act of this State requires that all public records and other matters be open to public inspection. A.R.S. § 39-121. We have no doubt that an agenda of a governing body's public meeting is a public record within the meaning of A.R.S. § 39-121.

B. The Public's Right to Speak at Public Meetings and the Requirement for Unanimous Consent of a Governing Body Before Members of the Public Can Speak at Such Meetings

Arizona's Open Meetings Act does not require that members of the public be permitted to speak at public meetings. Governing bodies, however, should remember that in some instances specific statutory provisions relating to certain meetings may require that the governing body permit the public to speak and participate in the deliberations of the body. See, e.g., A.R.S. § 41-1002. The portion of Opinion No. 73-9 with which we now disagree related to the Board of Regent's practice of requiring unanimous consent of the Board prior to permitting members of the public to speak. We know of no statutory provision either authorizing or prohibiting such a practice. In our view, however, the practice is ludicrous when one considers that a bare majority of a quorum of a governing body could by affirmative vote, suspend such a rule, thereby circumventing the policy and allowing the public to speak.

C. Deliberations in Closed Session Prohibited

In Opinion No. 75-7 we also stated that the Open Meetings Act prohibits governing bodies from holding closed sessions in which deliberations and discussions concerning proposed actions occurred. Opinion No. 75-7 specifically reversed Opinion No. 73-9 with respect to the answer to Question 4 contained in Opinion No. 73-9. We have enclosed for your information a

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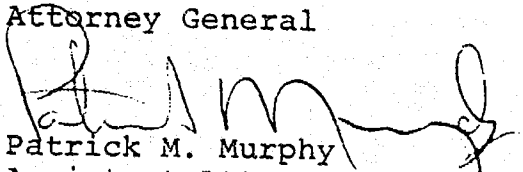
copy of Opinion No. 75-7. For your purposes the key provision of Opinion No. 75-7 reads as follows:

It is our opinion that all discussions, deliberations, considerations or consultations among a majority of the members of a governing body regarding matters which may foreseeably require final action or a final decision of a governing body, constitute "legal action" and must be conducted in an open meeting, unless an executive session is authorized. It should be pointed out, however, that such discussions and deliberations between less than a majority of the members of a governing body, or other devices, when used to circumvent the purposes of the act, would constitute a violation which would subject the governing body and participating members to the several sanctions provided for in the Act.

Accordingly, that portion of Opinion No. 73-9 which advised the Board of Regents that they could hold private sessions and discuss legal actions so long as the Board did not attempt to act without first voting in a public meeting is incorrect under the recent amendments to the Open Meetings Act. In our opinion, it is clear that not only must the final vote be taken in a public meeting, but all deliberations among a majority of the members of the Board leading up to that vote must be conducted in an open meeting.

Very truly yours,

BRUCE E. BABBITT
Attorney General



Patrick M. Murphy
Assistant Attorney General

PMM:FSW:kld
Enclosure

August 19, 1975

MEMORANDUM

TO: All State Agencies

FROM: Bruce E. Babbitt, Attorney General

RE: The Public Notice and Minute Taking
Requirements Under Arizona's Open
Meeting Act, as amended Laws 1975

Several questions have arisen as to the specific requirements imposed by Arizona's Open Meeting Act with respect to the giving of notice of public meetings. In addition, the Legislature, in its last regular session, amended the Open Meeting Act by including specific requirements with respect to the taking of minutes of public meetings. This memorandum is designed to clarify the public notice requirements imposed under the Act and to inform all state agencies of the recently enacted minute taking requirements.

If you have any questions regarding this memorandum, please call Roderick G. McDougall, Chief Counsel of the Civil Division at 271-3562.

PUBLIC NOTICE REQUIREMENTS

It has been stated that an "open meeting" is open only in theory if the public has no knowledge of the time and place at which it is to be held. 75 Harv.L. Rev. 1199 (1962). The right to attend and participate in an open meeting is contingent upon sufficient notice being given. Like other acts, Arizona's Open Meeting Act affords few statutory requirements for the mechanics of giving notice of meetings of governing bodies.

A.R.S. § 38-431.02, added Laws 1974, which sets forth the public notice requirements, provides as follows:

A. Public notice of all regular meetings of governing bodies shall be given as follows:

1. The state and its agencies, boards and commissions shall file a statement with the secretary of state stating where all

notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

2. The counties and their agencies, boards and commissions, school districts, and other special districts shall file a statement with the clerk of the board of supervisors stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

3. The cities and towns and their agencies, boards and commissions shall file a statement with the city clerk or mayor's office stating where all notices of their meetings and the meetings of their committees and subcommittees will be posted and shall give such public notice as is reasonable and practicable as to the time and place of all regular meetings.

B. If an executive session only will be held, the notice shall be given to the members of the governing body, and to the general public, stating the specific provision of law authorizing the executive session.

C. Meetings other than regularly scheduled meetings shall not be held without at least twenty-four hours' notice to the members of the governing body and the general public. In case of an actual emergency, a meeting may be held upon such notice as is appropriate to the circumstances.

D. A meeting can be recessed and held with shorter notice if public notice is given as required in paragraph A of this section.

The Open Meeting Act when originally enacted in 1962 made no specific provision for the giving of notice. While the requirements set forth in the 1974 amendments provide some guidelines, the particular mechanics of giving notice have not been set forth. Moreover, the language used in the 1974 amendments relating to notice is ambiguous, confusing and often contradictory. Without engaging in a long discussion of the many problems involved, we offer the following guidelines to be followed in complying with the notice requirements of A.R.S. § 38-431.02. Although an agency in following these guidelines will in some cases do more than required by the Act, it should never fall short of the Act's requirements. Being over-cautious is certainly justified, however, in view of the serious consequences for violating the Act. For example, a decision made in a meeting for which defective notice was given may likely be declared null and void by reason of A.R.S. § 38-431.05.

A. Statement to Secretary of State

Each state agency which is a governing body as defined in A.R.S. § 38-431 must file a statement with the Secretary of State stating where notices of all its meetings and the meetings of its committees or subcommittees will be posted. See Appendix A for a sample statement. The purpose of the statement is to provide information to the public regarding the place where it can find notices of the governing body's meetings. Generally, a governing body will post notices of its meetings directly outside the door to its offices or on a bulletin board in the lobby of the building in which the governing body's offices are located. Governing bodies which hold regular meetings on the same day of each month may post notices of such meetings by providing the information under the body's name in the building directory. For example, the directory listing in the lobby of the building might look as follows:

Arizona Accountancy Board Room 202
(Regular meetings every 2nd Monday of each month)

B. Regular Meetings

Regular meetings are generally those required to be conducted on a regular basis by statute and the dates of which are set by statute, rule, ordinance, resolution or

custom. For each regular meeting, the governing body must post a Notice of Regular Meeting at the place described in the statement filed with the Secretary of State as described above. See Appendix B for a sample Notice of Regular Meeting. The posting of this notice must be done as far in advance of the regular meeting as is reasonable and in no event less than 24 hours prior to the meeting. In addition, the governing body must give additional notice as is reasonable under the circumstances. Several types of additional notices which might be given are described in Paragraph F below.

C. Special Meetings Other Than Emergency Meetings

Special meetings are all meetings other than regular meetings. For each special meeting, the governing body must post a Notice of Special Meeting at the place described in the statement filed with the Secretary of State. See Appendix C for a sample Notice of Special Meeting. The governing body should also give such additional notice as is reasonable under the circumstances. See Paragraph F below. This additional notice must include notice both to the general public and each member of the governing body. The several notices given, including the Notice of Special Meeting posted as described above, must be accomplished at least 24 hours prior to the time of the special meeting, except in the case of an emergency meeting covered under Paragraph D below.

D. Emergency Meetings

Emergency meetings are those special meetings in which the governing body is unable to give the required 24 hours notice. In the case of an actual emergency, the special meeting may be held "upon such notice as is appropriate to the circumstances". The nature of the notice required in emergency cases is obviously subject to a case by case analysis and cannot be specified by general rules. However, any relaxation or deviation in the normal manner of providing notice of meetings, either to the general public or to members of the governing body, must be carefully scrutinized and can be justified only for compelling practical limitations on the ability of the governing body to follow its normal notice procedures.

E. Executive Sessions

An executive session is nothing more than a meeting (regular or special) wherein the governing body is allowed under the Open Meeting Act to discuss and deliberate on matters in secret. See A.R.S. § 38-431.03. Separate notice need not be given of an executive session if it is held in conjunction with a properly noticed regular or special meeting. However, where only an executive session will be held, all notices of the meeting must state the specific provision of law authorizing the executive session, including a reference to the appropriate paragraph of Subsection A of A.R.S. § 38-431.03. See Appendix D for a sample Notice of Executive Session.

F. Additional Notice

In deciding what types of notice shall be given in addition to posting, governing bodies should consider the following:

1. Newspaper Publications

In many cases, notice of meetings can be disseminated by providing press releases to newspapers published in the area in which notice is to be given. In addition, paid legal notices in such newspapers may be purchased by the governing body.

2. Mailing List

Some bodies may wish to provide a mailing list whereby persons desiring to obtain notices of meetings may ask to be placed on a mailing list. All notices of meetings issued will then be mailed to those appearing on the current mailing list.

3. Articles or Notices in Professional or Business Publications

In addition, the governing body may obtain publication of articles or notices in those professional and business publications relating to the agency's field of regulation.

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You should note that this section requires that the minutes or recording be open to public inspection, except as otherwise specifically provided by this article. The specific exception referred to is the provision in A.R.S. § 38-431.03 which provides that minutes of executive sessions shall be kept confidential.

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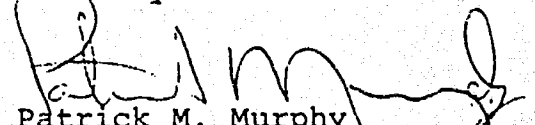
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